

**United States Department of Labor
Employees' Compensation Appeals Board**

S.M., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
Washington, DC, Employer**

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**Docket No. 15-1804
Issued: March 16, 2016**

Appearances:

*Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 31, 2015 appellant, through counsel, filed a timely appeal from a March 17, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish a recurrence of disability commencing April 24, 2013, causally related to her September 14, 2004 employment injury.

On appeal, counsel contends that OWCP should have: (1) expanded the class of accepted conditions to include all conditions outlined in the medical evidence; and (2) found that the recurrence of appellant's total disability of April 24, 2013 was compensable pursuant to FECA.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 19, 2004 appellant, a 57-year-old customs and border protection officer, filed a traumatic injury claim (Form CA-1) alleging that she sustained a lower back injury on September 14, 2004 as a result of lifting boxes and pulling containers in the performance of duty. She did not initially stop work. OWCP accepted the claim for lumbar radiculitis. It later accepted that appellant sustained a recurrence of disability on December 28, 2004 due to her employment condition. Appellant received appropriate wage-loss compensation from January 22, 2005 until she returned to full-time limited duty on December 5, 2005.²

Appellant continued receiving treatment for her accepted condition and sought authorization for additional treatment. In January 2007, OWCP referred her to Dr. Robert Israel, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her employment-related condition. In his January 9, 2007 report, Dr. Israel reviewed appellant's medical history and a statement of accepted facts, and provided the findings of a physical examination. He found that her lordotic curve was normal, there were no spasms or tenderness present over the paraspinal musculature on palpation, and sitting Lasègue's testing was bilaterally negative. Muscle strength of both lower extremities was graded at 5/5 and there was no atrophy present in the muscles of appellant's lower extremities. Dr. Israel concluded that appellant's lumbar radiculitis had resolved. He opined that she had no disability as a result of her employment injury and released her to full duty without restrictions.³

In a March 14, 2007 letter, OWCP advised the employing establishment that appellant was capable of returning to full-time, full-duty work and she returned to her date-of-injury position.

On February 22, 2010 appellant filed a claim for a schedule award (Form CA-7). In a May 13, 2011 decision, OWCP granted a schedule award for nine percent permanent impairment of the left lower extremity. The award ran for 25.92 weeks for the period December 10, 2009 to June 9, 2010.

On May 10, 2013 appellant filed a recurrence (Form CA-2a). She stated that 18 months after she returned to work she was reassigned to Building 77 as she was no longer able to work as a customs officer. Appellant noted that she would lose three to five days of work a month due to her lumbar injury and could never accrue any leave. She alleged that over the past six weeks her symptoms of pain in her lower back and legs had been chronic and in the past two weeks she had experienced loss of bowel control. The employing establishment stated that appellant stopped work on April 24, 2013 at 8:00 a.m. and that her pay stopped on April 25, 2013.

² Appellant's treating physician, Dr. Mark Kostin, an internist, advised that appellant could work with restrictions of "no side arm," no overtime or working more than five consecutive days, lifting up to 15 pounds, sitting for four hours, and standing for four hours.

³ OWCP subsequently found that Dr. Israel's opinion created a conflict with the opinion of Dr. Kostin. In a June 7, 2007 report, Dr. Michael Gerling, a Board-certified orthopedic surgeon and impartial specialist, diagnosed a herniated nucleus pulposus with resolved radiculopathy. He opined that the disc herniation was not compensable and that appellant could work full time with restrictions on lifting no more than 20 pounds. OWCP did not terminate appellant's benefits at that time.

Appellant submitted reports dated May 2 and 9, 2013 from Dr. R.C. Krishna, a Board-certified neurologist, who diagnosed lumbar radiculopathy and opined that she sustained an exacerbation of lower back pain. Dr. Krishna noted that appellant suffered a recurrence of her lower back pain initially caused by a work accident sustained on September 14, 2004. He concluded that appellant was totally disabled from work and her prognosis was guarded. Appellant also submitted physical therapy notes.

In a June 21, 2013 letter, OWCP advised appellant of the deficiencies of her recurrence claim. It requested additional evidence in support of the claim and afforded her 30 days to respond to its inquiries.

In a July 22, 2013 narrative statement, appellant indicated that in February 2013 she noticed that her symptoms from her lower back were no longer bad just a day or two. She stated that she was in pain and experienced discomfort daily. Appellant indicated that she underwent a magnetic resonance imaging (MRI) scan on March 14, 2013 and saw Dr. Krishna for an emergency appointment on April 23, 2013. The employing establishment confirmed that appellant's last day of work was April 23, 2013 and that her pay status stopped on April 25, 2013.

Appellant submitted a February 12, 2013 electromyography (EMG) study which revealed evidence of chronic left C5-6 cervical radiculopathy, and February 14, 2013 EMG and nerve conduction velocity (NCV) studies which revealed evidence of a suggestive right L5-S1 radiculopathy. She further submitted MRI scans of the cervical and lumbar spine dated February 28, 2013, which showed multilevel degenerative disc disease at every level of the cervical spine and circumferential disc bulges with mild midline disc herniations at L2-5.

In reports dated June 11 and 17, 2013, Dr. Kostin, an internist, noted that appellant suffered with lower back pain due to her September 14, 2004 employment injury and had an exacerbation of her lower back pain, which became worse since February 2013. He diagnosed sciatica, thoracic or lumbosacral neuritis or radiculitis, lumbago, and displacement of intervertebral disc without myelopathy. Dr. Kostin advised that appellant required continued physical therapy treatments.

On July 5, 2013 Dr. Demetrios Mikelis, an internist and physiatrist, diagnosed cervical and lumbar sprain with herniated nucleus pulposus (HNP).

In reports dated June 27 and July 11, 2013, Dr. Krishna diagnosed neuropathy and lumbosacral radiculopathy and opined that appellant was unable to work because of her disabilities. In a second July 11, 2013 report, he asserted that she was his patient with a diagnosis of cervical and lumbar radiculopathy who recently had an exacerbation of lower back pain and neck pain. Dr. Krishna reported that appellant had EMG and NCV studies of the upper and lower extremities which revealed chronic cervical and lumbar radiculopathy. He found that her clinical features suggested underlying cervical and lumbar disc pathology resulting in radiculopathy. Dr. Krishna opined that appellant needed to be home to rehabilitate herself to go back to work and should continue physical therapy. He concluded that based on her history and physical examination there was a "reasonable degree of medical certainty" that her physical injuries were causally related to the September 14, 2004 employment injury.

By decision dated August 9, 2013, OWCP denied appellant's recurrence claim, finding that the medical evidence of record was insufficient to establish that she sustained a recurrence of disability commencing April 24, 2013, causally related to her September 14, 2004 employment injury.⁴

On July 14, 2014 appellant's counsel requested reconsideration. Appellant submitted a December 19, 2013 MRI scan of the thoracic spine which showed mild compression deformity of T11 and circumferential disc bulge with mild midline disc herniation at T10-11. She also submitted a March 31, 2014 report from Dr. Krishna who reiterated his diagnoses and opinions.

In reports dated August 8, 2013 through April 4, 2014, Dr. Sebastian Lattuga, a Board-certified orthopedic surgeon, diagnosed cervical sprain, cervical HNP with myelopathy, lumbar spine strain, and herniated lumbar intervertebral disc. He reported that appellant sustained an injury on September 14, 2004 and complained of low back pain with radiation into both right and left lower extremities, as well as loss of bowel control since February 2013. On February 7, 2014 Dr. Lattuga noted that in 2013 she experienced increasing pain over several months to the point that she was unable to work on April 25, 2013, and her pain steadily increased for several months due to repetitive lifting and bending at work.

On July 5, 2013 Dr. Mikelis diagnosed cervical sprain, cervical HNP with myelopathy, lumbar spine strain, and herniated lumbar intervertebral disc. He reported that appellant sustained an injury on September 14, 2004 and complained of low back pain with radiation into both right and left lower extremities, as well as loss of bowel control since February 2013.

In reports dated August 18, 2013 through January 30, 2014, Dr. Keyvan Jahanbakhsh, an interventional pain medicine specialist and anesthesiologist, diagnosed displacement of lumbar disc without myelopathy, lumbosacral neuritis, and lumbago. He noted that appellant "suffered from lower back pain for the past 10 years which suddenly worsened about 11 months [ago]." Dr. Jahanbakhsh indicated that her initial pain started at work while lifting heavy boxes and began again at work, gradually developing secondary to repetitive movements. Appellant reported increased bowel urgency, but did not report a loss of control in either her bowel or bladder function. On November 21, 2013 Dr. Jahanbakhsh reported that her pain was constant, but could suddenly worsen. Appellant complained that her pain radiated across her lower back and into the right posterior aspect of her thigh and was exacerbated when sitting and standing for extended periods of time or when performing any type of physical activity.

By decision dated March 17, 2015, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that

⁴ On March 14, 2014 appellant filed a claim for wage-loss compensation (Form CA-7) for the period April 24 to May 25, 2013. In a March 20, 2014 letter, OWCP advised appellant that the claim was not payable as her recurrence claim had been denied.

caused the illness.⁵ This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn (except when such withdrawal occurs for reasons of misconduct, nonperformance of job duties, or a reduction-in-force), or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations.⁶

When an employee, who is disabled from the job he or she had when injured on account of employment-related residuals, returns to a limited-duty position or the medical evidence of record establishes that he or she can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative, and substantial evidence a recurrence of total disability and to show that she cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.⁷ This burden includes the necessity of furnishing evidence from a qualified physician who concludes, on the basis of a complete and accurate factual and medical history, that the disabling condition is causally related to the employment injury. The medical evidence must demonstrate that the claimed recurrence was caused, precipitated, accelerated, or aggravated by the accepted injury.⁸

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.⁹ The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.¹⁰

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that she sustained a recurrence of disability commencing April 24, 2013, causally related to her September 14, 2004 employment injury.

OWCP accepted that appellant sustained lumbar radiculitis on September 14, 2004 as a result of lifting and pulling at work. Appellant returned to full-time, limited-duty work based on a January 9, 2007 second opinion report from Dr. Israel finding that her lumbar radiculitis had

⁵ 20 C.F.R. § 10.5(x). *See T.S.*, Docket No. 09-1256 (issued April 15, 2010).

⁶ *Id.*

⁷ *See A.M.*, Docket No. 09-1895 (issued April 23, 2010). *See also Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁸ *See L.F.*, Docket No. 14-1817 (issued February 2, 2015); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.2 (January 2013).

⁹ *See I.R.*, Docket No. 09-1229 (issued February 24, 2010); *D.I.*, 59 ECAB 158 (2007).

¹⁰ *See I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 465 (2005).

resolved without residuals. She stopped work on April 24, 2013 and on May 10, 2013 she filed a recurrence. The Board finds that the evidence submitted by appellant lacks adequate rationale to establish a causal connection between the alleged recurrence of disability and the accepted employment injury. Thus, appellant did not meet her burden of proof to establish a claim for a recurrence.

In his reports, Dr. Jahanbakhsh, diagnosed displacement of lumbar disc without myelopathy, lumbosacral neuritis, and lumbago and reported that appellant's pain was constant but could suddenly worsen. He noted that she had "suffered from lower back pain for the past 10 years which suddenly worsened about 11 months [ago]," secondary to repetitive movements. Dr. Jahanbakhsh failed to provide a rationalized opinion explaining how factors of appellant's federal employment, such as repetitive movements, caused or aggravated her lumbar conditions. He noted that her condition occurred while she was at work, but such generalized statements do not establish causal relationship because they merely repeat her allegations and are unsupported by adequate medical rationale explaining how her physical activity at work actually caused or aggravated the diagnosed condition.¹¹ The Board finds that Dr. Jahanbakhsh failed to provide sufficient medical rationale explaining how appellant's symptoms beginning on April 24, 2013 were causally related to the September 14, 2004 employment injury. Thus, the Board finds that this evidence insufficient to establish that she sustained a recurrence of disability.

In his reports, Dr. Krishna diagnosed neuropathy, cervical radiculopathy, and lumbar radiculopathy. He opined that appellant had a recurrence of her lower back pain due to a work accident sustained on September 14, 2004 and was totally disabled for work. Dr. Krishna concluded that based on her history and physical examination there was a "reasonable degree of medical certainty" that appellant's physical injuries were causally related to the September 14, 2004 employment injury. The Board finds that Dr. Krishna failed to provide sufficient medical rationale explaining how appellant's symptoms beginning on April 24, 2013 were causally related to the September 14, 2004 employment injury. Thus, the Board finds that his reports are insufficient to establish that she sustained a recurrence of disability.

In his reports, Dr. Kostin noted that appellant suffered from lower back pain due to her September 14, 2004 employment injury and had an exacerbation of her lower back pain, which became worse since February 2013. He diagnosed sciatica, thoracic or lumbosacral neuritis or radiculitis, lumbago, and displacement of intervertebral disc without myelopathy. The Board finds that Dr. Kostin failed to provide sufficient medical rationale to explain how appellant's symptoms beginning on April 24, 2013 were causally related to the September 14, 2004 employment injury. Thus, the Board finds that this evidence insufficient to establish her claim.

In their reports, Drs. Mikelis and Lattuga diagnosed cervical sprain, cervical HNP with myelopathy, lumbar spine strain, and herniated lumbar intervertebral disc. These reports are insufficient to establish appellant's claim. They failed to provide sufficient medical rationale explaining how her symptoms beginning on April 24, 2013 were causally related to the September 14, 2004 employment injury and why they were so debilitating as to preclude her from working. Moreover, OWCP has not accepted a cervical condition in this case and, as such,

¹¹ See K.W., Docket No. 10-98 (issued September 10, 2010).

appellant has the burden of proof to establish causal relationship.¹² For the aforementioned reasons, she has not done so. Therefore, this medical evidence is insufficient to establish her claim for a recurrence of disability.

Other medical reports of are of limited probative medical value as they do not specifically address whether appellant's disability beginning April 24, 2013 was attributable to her accepted work injury.¹³ Appellant also submitted physical therapy records. However, records from a physical therapist do not constitute competent medical evidence because a physical therapist is not considered a "physician" as defined under FECA.¹⁴

On appeal, counsel contends that OWCP should have: (1) expanded the class of accepted conditions to include all conditions outlined in the medical evidence; and (2) found that the recurrence of appellant's total disability of April 24, 2013 was compensable pursuant to FECA. The Board finds that the evidence submitted by appellant lacks adequate rationale to establish a causal connection between the alleged recurrence of disability and the accepted September 14, 2004 employment injury. Appellant has failed to meet her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a recurrence of disability commencing April 24, 2013, causally related to her September 14, 2004 employment injury.

¹² See *Jaja K. Asaramo*, 55 ECAB 200 (2004) (where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury).

¹³ See *K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006); *Linda I. Sprague*, 48 ECAB 386 (1997) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹⁴ 5 U.S.C. § 8101(2); *Jennifer L. Sharp*, 48 ECAB 209 (1996) (physical therapists). See also *Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 16, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board